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No. 00-60

In the Supreme Court of the United States

RONALD WOODRUM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether police officers' brief stop of a taxicab in which petitioner was a passenger violated petitioner's Fourth Amendment rights, where the stop was made pursuant to the cab company's consent as part of a program designed to promote the safety of taxi drivers.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Delaware v. *Prouse*, 440 U.S. 648 (1979)	9
Frazier v. *Cupp*, 394 U.S. 731 (1969)	11
Maryland v. *Wilson*, 519 U.S. 408 (1997)	8, 10
Muhammad F., In re, 722 N.E.2d 45 (N.Y. 1999), petition for cert. pending, No. 99-1443	6, 7, 8
New York v. *Class*, 475 U.S. 106 (1986)	10
Schneckloth v. *Bustamonte*, 412 U.S. 218 (1973)	10
Skinner v. *Railway Labor Exec. Ass'n*, 489 U.S. 602 (1989)	11
South Dakota v. *Opperman*, 428 U.S. 364 (1976)	10
United States v. *Martinez-Fuerte*, 428 U.S. 543 (1976)	10
United States v. *Matlock*, 415 U.S. 164 (1974)	10-11

Constitution and statutes:

U.S. Const. Amend. IV	4, 5, 6, 7, 8, 9, 10
18 U.S.C. 922(g)(3)	2
21 U.S.C. 844 (1994 & Supp. IV 1998)	2

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 202 F.3d 1.

JURISDICTION

The court of appeals entered its judgment on January 20, 2000. A petition for rehearing was denied on April 6, 2000 (Pet. App. 26a). The petition for a writ of certiorari was filed on June 22, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional plea of guilty in the United States District Court for the District of Massachusetts, petitioner was convicted of being a drug user in possession of a firearm, in violation of 18 U.S.C. 922(g)(3), and of possession of cocaine base, in violation of 21 U.S.C. 844 (1994 & Supp. IV 1998). He was sentenced to 27 months' imprisonment, to be followed by two years' supervised release. The court of appeals affirmed.

1. In response to a series of serious assaults against taxicab drivers and drivers' demands for better police protection, the Boston Police Department created the "Taxi Inspection Program for Safety" or "TIPS" program. The TIPS program authorizes Boston police officers to stop taxicabs whose owners have voluntarily agreed to participate in the program when necessary in order to ensure driver safety. Taxi owners who want to participate must register with the Boston Police Department and affix three numbered decals—one on each of the rear passenger windows and one in a conspicuous location in the rear passenger compartment—advising passengers in English and Spanish that "THIS VEHICLE MAY BE STOPPED AND VISUALLY INSPECTED BY THE BOSTON POLICE AT ANY TIME TO ENSURE DRIVER'S SAFETY." Gov't C.A. Br. 4-6; Pet. App. 2a-3a, 52a.

According to the Boston Police Commissioner's order implementing TIPS, "[b]oth uniform and plain clothes personnel are encouraged to make frequent stops of taxis which are displaying the above decals for the purpose of checking on the operator's safety." Pet. App. 50a. The order further provides that

> Stops should be conducted when and wherever necessary, particularly during the evening and early

> morning hours. Attention will be given to isolated and high crime areas. Taxi drivers are not to be detained longer than is necessary to check on the welfare of the operator. Passengers in occupied taxis are to be given a brief explanation of the purpose of the stop: **Operator Safety.**

Ibid.[1]

2. Shortly after midnight on January 22, 1998, Boston police officers Stephen Meade and Eric Bulman, dressed in plain clothes and operating an unmarked patrol car, responded to a reported shooting in a high-crime section of the city. Pet. App. 4a. After assisting in what later turned out to be an unrelated arrest, the officers returned to their vehicle approximately one half-hour after the reported shooting. *Ibid.* At that time, the officers saw a taxicab approach in which petitioner was a passenger. Both officers observed petitioner, who was wearing a stocking cap and possibly sunglasses, look at them and then slouch down in the corner of the back seat. *Id.* at 5a; Pet. 5. After the taxi turned, Sergeant Meade saw petitioner turn his head to look back at him and Sergeant Bulman. Both officers noticed that the taxicab had TIPS program decals on its rear passenger windows. Pet. App. 5a; Gov't C.A. Br. 3-4.

After observing the TIPS decals and petitioner's unusual behavior in the back seat, Sergeants Meade and Bulman decided to follow the taxi out of a concern that petitioner might have been involved in the recent, nearby shooting incident. Pet. App. 5a. After briefly following the taxi, the officers stopped it. As they ap-

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[1] After conducting a TIPS stop, police officers must submit a TIPS form documenting the circumstances of the stop. Such a form was submitted in this case. Gov't C.A. Br. 5; Pet. App. 42a.

proached, the officers observed petitioner, who was now sitting in an upright position, drop his left shoulder down and raise his right shoulder and arm. When they got beside the taxi, the officers could see that petitioner's right hand was hidden under his jacket. *Ibid.* Suspecting that petitioner was hiding a firearm in his jacket, Sergeant Bulman opened one passenger door and Sergeant Meade opened the other. *Ibid.*; Gov't C.A. Br. 6. When Sergeant Meade identified himself as a police officer, petitioner exclaimed that he was not "doing anything" and did not "have anything." Gov't C.A. Br. 7. Petitioner gestured to his left jacket pocket, which contained a beer bottle, and "protest[ed] that all he had was a beer." Pet. App. 5a. Sergeant Bulman directed petitioner to put his hands in view, because petitioner's right hand was still inside his jacket. *Ibid.* Petitioner failed to comply, and Sergeant Meade ordered him to step out of the taxicab. As petitioner stepped out, a holstered revolver fell out of his jacket. Petitioner was arrested and taken to the police station, where officers recovered crack cocaine and a crack pipe from his person. *Id.* at 5a-6a.

3. Petitioner moved to suppress the gun and the evidence uncovered during the subsequent search of his person on the ground that the stop of the taxi violated the Fourth Amendment. The district court denied the motion on the grounds both that the officers had reasonable suspicion to stop the taxi, Pet. App. 44a, and that the stop of the taxi under the TIPS program was reasonable under the Fourth Amendment because of the taxi owner's advance consent, *id.* at 45a-46a. Petitioner entered a conditional plea of guilty, preserving his right to appeal the denial of his motion to suppress. *Id.* at 6a.

4. The court of appeals affirmed. Pet. App. 1a-24a. With respect to the district court's finding that the officers had reasonable suspicion to stop the taxi, the court of appeals concluded that "reasonable suspicion presents a question that can be argued persuasively either way," *id.* at 10a, but decided not to resolve the question, because "the district court's alternative holding—that the taxi driver had authority to consent to a TIPS stop, and that the consent legitimized this particular stop—is less problematic," *id.* at 11a (citation omitted). The court of appeals held that the officers' seizure of the taxi with the consent of its owner and its driver was reasonable under the Fourth Amendment because "the [taxi] owner freely chose to register for the program of taxi safety stops, and the TIPS decals furnish tangible proof of this consent." *Id.* at 13a. The court also concluded that the owner's consent was sufficient under the Fourth Amendment to justify a stop of the driver-employee, because "the owner acted on the employee's behalf [to secure his or her safety] as well as his own," *id.* at 15a, and, in any event, it was "fair under the circumstances to regard the driver himself as having consented to the stop," *ibid.*

The court of appeals held that the consent of the owner and the driver rendered the seizure of the taxi reasonable with respect to the petitioner as well. Pet. App. 12a-24a. The court explained that, although a taxi passenger has "a degree of authority over the direction and destination of the vehicle," the driver's "command of the taxi allows him to maintain control over the vehicle's speed and route of travel," *id.* at 18a, and thus "the driver has the authority to consent to a stop in his own right, and * * * the passenger, by entering the cab, assumes the risk that the driver may exercise his

right to s[t]op briefly along the way (say, to converse with a police officer)," *ibid.*

Finally, the court of appeals explained that, while the TIPS program consent could not justify "every type of seizure," Pet. App. 18a, the limited intrusion involved here was reasonable under the Fourth Amendment. Balancing the gravity of the individual intrusion against the governmental interests served by the program, the court concluded that (1) "TIPS came into being as a considered response to grave safety concerns," *id.* at 19a; (2) the officers' discretion is not unfettered because "stops are to be conducted only 'when . . . necessary' to check on the taxi operator's safety," *id.* at 20a; (3) the intrusion on the passenger's liberty is "slight," *ibid.*; and (4) while a "reasonable passenger might well experience fear or anxiety in the interval between a stop and an officer's explanation[,] * * * under the TIPS regime this interval is usually quite brief, and the possibility of emotional distress is lessened somewhat by the existence of the decals and publicity about the program—avenues though which a reasonable passenger might be aware that the police were stopping taxis to check the drivers' well-being," *id.* at 20a-21a.[2]

ARGUMENT

1. Petitioner contends (Pet. 11-12) that this Court should review the decision below because it conflicts with a decision of the New York Court of Appeals. No such conflict exists, however. In *In re Muhammad F.*, 722 N.E.2d 45 (1999), petition for cert. pending, No. 99-1443, the New York Court of Appeals invalidated an

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[2] Three judges dissented from the court's denial of rehearing en banc, Pet. App. 28a-38a, expressing the view that the court's resolution of a "novel constitutional issue," *id.* at 32a, may have been incorrect.

unwritten police policy of stopping taxicabs without any suspicion of wrongdoing to provide a "safety check" during which the officer would "give the drivers crime prevention information and make an assessment of whether the driver may have been in danger." *Id.* at 46. The safety check generally "involve[d] asking the passengers to 'step out briefly' or 'telling passengers to get out' while the officers searched around and under the seats." *Ibid.* The New York Court of Appeals held that the stops and searches were unreasonable under the Fourth Amendment because (1) the State did not offer any evidence that the policy "was a reasonably effective means of furthering the State interest in reducing violent crimes against taxi drivers," *id.* at 50-51; (2) the stops are "excessively and, * * * unjustifiably intrusive," *id.* at 51, because they "routinely involve[] a request or direction that the passengers step out of the cab while the officers search[] it," *ibid.*, and they take motorists "by surprise," *ibid.*, because they are conducted at night without any "signs, cones or flares to warn the drivers that they would be stopped," *ibid.*; and (3) the officers had unconstrained discretion to stop the taxis, *ibid.*

The TIPS program sustained by the court of appeals here differs substantially and in material respects from the program invalidated in *Muhammad F.* First, the TIPS program is entirely voluntary and based on the cab owners' and, the court found here (Pet. App. 15a), cab driver's consent.[3]

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[3] Petitioner argues (Pet. 13-15 & n.3) that the driver did not in fact consent and that the driver was an independent contractor, rather than an employee. The lower court's determination of those issues, however, does not warrant this Court's review.

Second, the stops at issue in *Muhammad F.* were markedly more intrusive, involving an emptying of the vehicle's passengers, which effects an independent seizure of the passengers, see *Maryland* v. *Wilson*, 519 U.S. 408, 413-415 (1997), and a search of the car. Under the TIPS program, the passenger is seized only by virtue of the consensual stop of the driver, and such a seizure of passengers in an automobile does not generally require independent and individualized Fourth Amendment justification. See *id.* at 414; see also *id.* at 420 (Stevens, J., dissenting) ("But the passengers had not yet been seized at the time the car was pulled over, any more than a traffic jam caused by construction or other state-imposed delay not directed at a particular individual constitutes a seizure of that person."); see also Pet. App. 20a ("TIPS stops are usually brief and involve only limited inquiries to the driver and a quick visual inspection of the cab's interior.").[4]

Third, unlike the *Muhammad F.* program, 722 N.E.2d at 51, the TIPS program provides advance notice to passengers about the potential stops, see Pet. App. 3a, thereby minimizing the passenger's subjective anxiety during a stop.

Fourth, New York police officers conducted the stops in *Muhammad F.* without any suspicion that the taxi drivers' safety was at risk, 722 N.E.2d at 47, while the TIPS program authorizes stops only when the investigating officers "suspect that a cab driver is in harm's way," Pet. App. 23a, such as the present case where the officers suspected that "a violent criminal was in the taxi," *ibid.*

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[4] As the court of appeals in this case held, Pet. App. 23a, the officers ordered petitioner out of the cab only after they developed reasonable suspicion that petitioner was concealing a weapon.

In short, the difference in outcomes between the *Muhammad F.* case and the court of appeals' decision here is attributable, not to a conflict concerning the applicable legal principles for analyzing taxi stops, but to the material factual distinctions between the two programs.

2. Petitioner also errs in contending (Pet. 9-10, 13-17) that the court of appeals' decision conflicts with this Court's Fourth Amendment precedents. This case is unlike *Delaware* v. *Prouse*, 440 U.S. 648 (1979), in which this Court held that discretionary, roving stops of vehicles to check drivers' licenses and registrations violate the Fourth Amendment. Unlike the stops at issue in *Prouse*, the stops at issue here are based on the voluntary consent of the cab owner and taxi driver, and the decals and publicity about the TIPS program provide advance notice to passengers. Nor do the police have unregulated discretion to stop taxis, since they may act only when "necessary to ensure the [taxi] drivers' safety." Pet. App. 22a.[5]

The decision is also consistent with this Court's established jurisprudence concerning third-party consent. As an initial matter, where the police have the lawful authority briefly to seize a motor vehicle and its driver —whether based on consent or individualized suspicion that a traffic infraction has occurred—this Court's cases have not suggested that the police must also demon-

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[5] This Court need not hold the petition in this case pending its decision in *City of Indianapolis* v. *Edmond*, No. 99-1030 (argued Oct. 3, 2000). That case involves the constitutionality of vehicle checkpoints that interdict drug trafficking and enforce license-and-registration requirements. Because the present case does not involve a roadblock program and because the stops at issue in *Edmond* are nonconsensual, the decision in that case is unlikely to affect the proper disposition of the present petition.

strate a particularized basis for stopping each of the passengers in the car. In fact, both the majority and dissenting opinions in *Maryland* v. *Wilson*, *supra*, indicate that no additional justification is required for simply stopping a car in which passengers are riding. See 519 U.S. at 414; *id.* at 420 (Stevens, J., dissenting). It is only when officers take steps that measurably enhance, in a manner particularized to the passengers, either the intrusiveness or length of the seizure that independent Fourth Amendment justification is required.

Second, it is "well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 219 (1973). The court of appeals thus properly applied this Court's precedents in holding that a taxi passenger—especially after viewing the TIPS decals in the car—should reasonably expect that his travel could be briefly interrupted by the decision of the taxi driver or someone else who shares control over the taxi to consent to a brief police inquiry into the driver's well-being.[6] Cf. *United States* v. *Matlock*, 415

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[6] Petitioner's suggestion (Pet. 15) that a passenger in a taxicab has a greater expectation of privacy than a person who shares a home with another runs counter to this Court's long line of cases holding that "one's expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and freedom in one's residence." *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 561 (1976). The reduced expectation of privacy in a vehicle is owing to the "obviously public nature of automobile travel," *South Dakota* v. *Opperman*, 428 U.S. 364, 368 (1976), and the fact that automobiles are subject to a "web of pervasive regulation." *New York* v. *Class*, 475 U.S. 106, 112 (1986).

U.S. 164, 171 (1974) (third-party consent valid where consenting party "possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected"); *Frazier* v. *Cupp*, 394 U.S. 731, 740 (1969) (holding that defendant had "no valid search and seizure claim" because "in allowing Rawls to use the bag and in leaving it in [Rawls'] house, [defendant] must be taken to have assumed the risk that Rawls would allow someone else to look inside").[7]

Third, and in any event, this case does not provide an appropriate vehicle for addressing the constitutional question that petitioner poses. The district court separately found that the stop at issue here was independently justifiable on the basis of reasonable suspicion. Pet. App. 44a. The existence of that alternative ground for sustaining the court of appeals' decision thus could make resolution of the consensual stop question unnecessary.

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[7] Petitioner argues (Pet. 17-18) that the consent of the taxicab owner cannot justify the stop because the owner is acting as an agent of the state. That issue, however, was not decided by the court of appeals. Petitioner, in any event, does not dispute that a taxi owner is a private party, and "as far as the evidence shows, the owner freely chose to register for the program of taxi safety stops." Pet. App. 13a. Cf. *Skinner* v. *Railway Labor Exec. Ass'n*, 489 U.S. 602, 615 (1989) (regulatory scheme effectively compelled urine testing by private railroads).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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